**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**(COMMERCIAL DIVISION)**
**AT DAR-ES-SALAAM**

**COMMERCIAL CASE NO.06 OF 2020**

BRITAM INSURANCE TANZANIA LTD...............PLAINTIFF

VERSUS

UDA RAPID TRANSIT PUBLIC LTD
COMPANY.............................................1ST DEFENDANT
THE HON.ATTORNEY GENERAL...............2ND DEFENDANT

*Last Order: 04th Oct. 2021*
*Ruling: 12th Nov. 2021*

**RULING**

**NANGELA, J.:**

The Plaintiff is suing the Defendants and seeks from the 1st Defendant, judgement and decree as follows:

1. Payment of TZS 317,507,014, being an outstanding amount on Motor Vehicle Insurance Policies.
2. Commercial interest at the Bank of Tanzania lending rate as applicable on the 28th April 2017 to the date of judgement.
3. Interest on the decretal sum at Court's rate of 7% per annum from the date of judgment to the date of full payment.
4. Cost of this suit
5. Any other relief as the Court may deem just to grant.

The parties had gone far as the suit was already set for hearing, after convening a final pre-trial and drawing up the agreed issues for determination. On 2nd June 2021, the day when the suit was set for hearing, Mr Patrick Mtani, the learned advocate who by then appeared for the 1st Defendant (because the 2nd Defendant was yet to be joined) raised a concern that although initially the Defendant was being owned by the Treasurer Registrar (TR) by 49%, there has been change of circumstance and now the TR owns 85% of Defendant and 15% of its shares are owned by private investors.

As such, Mr Mutani prayed for time to allow the majority shareholder of the 1st Defendant, through its relevant machinery, to enter appearance before we proceed further. Ms Miriam Babucha and Ms Irine Mchaki who appeared for the Plaintiff did not object to that prayer, and I granted it fixing the matter for mention on 12th June 2021.

On 12th June 2021, Ms Bachuba appeared for the Plaintiff while Ms Sechelela Chitinka appeared for the 1st Defendant. Ms Sichelela prayed that the Hon. Attorney General be joined in this suit since the government through the TR is the majority shareholder of the Plaintiff. Following that prayer, Ms Bachuba did also ask the Court to allow the Plaintiff to amend the Plaint so as to effect those necessary changes.

On the basis of such prayers by both counsels for the parties, this Court made the following orders:

1. That, the Hon. Attorney General be joined as prayed.
2. The Plaintiff's prayer to amend the Plaint to reflect the changes in the Plaint is hereby granted.
3. The amended Plaint be filed on or before 26th July 2021.
4. The Defendants to file their amended WSD on or before 9th August 2021.
5. Mention on 19th August 2021. All parties to attend.

On the 19th August 2021, Ms Kause Kilonzo, learned Sate Attorney and Mr Mtani, learned Advocate appeared for the Defendants herein while Ms Bachuba appeared for the Plaintiff. The Plaintiff prayed to file a reply to the written statement of defence a prayer which was granted. However, having filed their joint written statement of defence, the Defendants raised two preliminary points of law, which they prayed to have them disposed of by way of written submission. The two preliminary objections were as follows:

1. The suit is bad in law as it has contravened section 6 (2) of the Government Proceedings Act, Cap.5 R.E 2019.
2. The suit is bad in law as the amended Plaint is incompetent since it has been amended beyond the orders of this Honourable Court in paragraphs 5, 6(a), 7, 8, 12, 14 and 15.

I granted the prayer to file a reply to the WSD and made an order that the two preliminary objections be disposed of by way of filing written submissions. A schedule of filing such submissions was given and the parties have duly complied with it. This ruling, therefore, is in respect of the two preliminary objections.

In her submissions, the learned State Attorney submitted that section 6 (2) of the Government Proceedings Act, Cap.5 R.E 2019, requires that whoever wishes to institute any suit against the government or its entities should issue a 90 days' notice, failure of which renders the suit incompetent. She cited, to her aid, the decision of this Court in the case of **AVIC Shantui Tanzania Limited vs. Stamigold Company Ltd**, Civil Case No 210 of 2019 (unreported) and **Thomas Ngawaiya vs.The Attorney General and 3 Others** , Civil case No.177 of 2013, (HC) (unreported).

It was the submission of the learned State Attorney for the Defendants that, although on the 26th day of July 2021 the Plaintiff filed its amended Plaint, the earlier Plaint which sought to be amended, which was filed in this Court on 21st January 2020, was instituted in breach of the law since by that time the Defendant was owned by the Government by 85%. She submitted that, even at such a time of instituting this matter in Court, the Plaintiff ought to have complied with the requirements of the law.

The State Attorney for the Defendants submitted that, the 14 day's notice referred to in Paragraph 11 and attached to the Plaint as "BITL 15" is in contravention of the requirements of the law because, even before the enactment of the Written Laws (Miscellaneous Amendments) Act No.1 of 2020, the majority shareholder of the 1st Defendant was the central government.

Ms Kause Kilonzo submitted, therefore, that, nowhere in any of the paragraphs of the Plaint filed in this Court on the 21st January 2020, was it shown that the Plaintiff complied with the requirements of the law, a fact which renders the suit incompetent for having been instituted prematurely before issuance of the 90 days notice.

She contended that, a suit found to be incompetent ought to be struck out. To support her position she relied on the case of **Ghati Methusela vs Matiko w/o Marwa Mariba**, Civil Appl. No.06 of 2006, CAT (Mza) (unreported).

Concerning the second preliminary objection, it was Ms Kilonzo's submission that, the suit is as well bad in law because the amended Plaint is incompetent since it has been amended beyond the orders of this Honourable Court in paragraphs 5, 6 (a), 7, 8, 12, 14 and 15. She submitted that, the act is a

disregard of the Court orders and should not be condoned. She relied on two cases in support of her submission. These are the decisions of the cases of Micky Gilead Ndetura (a minor suing through **Gilead Ndetura Lembai a next friend) vs. Exim Bank (T) Ltd,** Commercial Case No.4 of 2014 and **Mohamed Rajuu Hassan vs.Salim Ally Al-Saad and Another,** Land Case No.32 of 2013 (HC) Arusha (unreported).

Ms Kilonzo submitted that, the amendment orders of this Court were only meant to join the Attorney General as a Party to the suit but the Plaintiff and, without leave of the Court, went ahead to amend the contents of the plaint, including introducing to the Plaint new paragraphs thereto and documents which hitherto were not annexed.

She submitted that, paragraphs 4 in the previous Plaint has sub-paragraphs (a) to (h) but it now reads as paragraph 5(a) to (j), introducing thereto, items (i) and (j). She submitted that, all annexure marked **"BITL1"** were neither signed nor did they contain any stamp thereof, but that, the new annexure marked **"BITL1"** are new documents, signed and stamped.

Further, it was her submission that, the previous paragraph 5 contained items (a) to (c) but that paragraph now reads as paragraph 6 (a) to (d). As well, the whole of paragraph 7 and its annexure in the amended Plaint is

a new paragraphs not pleaded anywhere in the previous Plaint, and, that, paragraph 6 of the previous Plaint which now reads as paragraph 8 contain facts which were not earlier on pleaded. She submitted that, while previously the paragraph 6 had pleaded 66 vehicle cover notes, in paragraph 8 the number of pleaded vehicles cover notes is 125.

Other paragraphs changed in the new plaint without leave of the Court are said to be paragraphs 10, of the previous Plaint, which now reads as paragraph 12 and contains new facts altogether, and the previous paragraphs 12 and 13 were abandoned.

It was her submission that, paragraphs 14 and 15 of the amended Plaint are new facts altogether as they were not in the previous Plaint. She contended that, if the Plaintiff had intended to do all such major amendments to the Plaint, then her counsel appearing in court ought to have prayed for leave to do all such amendments.

She contended further that, this Court should take into account that the prayer to have the Attorney General made a party was not of the Plaintiff but the counsel for the Defendants. In view of all that, the Defendants have urged this Court to strike out the suit with costs.

In reply to the Defendants' submissions, the Plaintiff's counsel filed written submissions as well. In her submission, Ms Bachuba submitted that, the first

preliminary objection does not fit within the test of a preliminary objection under the law. She cited to her aid, the cases of **Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd** [1969] EA 696, and **Karata Ernest and Others vs. Attorney General,** Civil Rev. No. 10 of 2010 (unreported).

She submitted that, if the Court is to decided whether a 90 day's notice was necessary, it will have ascertain if the 1st Defendant was a government entity at the time of filing this suit. She contended that, in that regard, the Court has to determine whether at the time of filing the TR did own 85 % of the shares of the 1st Defendant or rather whether the TR was a majority shareholder. She argued that, such cannot be ascertained from the facts pleaded in the Defendant's written Statement of Defence because the same does not imply that at the time of filing the suit on 21st January 2020, the 1st Defendant was a government entity.

In the alternative, Ms Bachuba argued that, even if this Court will find that the point raised by the defendants qualifies as a point of law, at the time of filing the suit the 1st Defendant was not a government entity.

Relying on section 6 (2) and (3) of the Government Proceedings Act, Cap. 5 R.E 2019, she contended that, the provisions clearly defines what constitute the "Government" and are clear regarding where a notice of

90 days ought to be sent. She contended that, at the time of filing the suit, neither was the 1st Defendant a "Government Ministry, Department nor officer" but rather, it is shown at paragraph 2 of the Plaint, that, "**UDA Rapid Transit Limited**" was a limited liability private company, and the Defendant noted such facts in the WSD.

Ms Bachuba submitted further, that, the fact that the **"TR"** was the majority shareholder of the 1st Defendant was not pleaded, does not make the 1st Defendant a government entity in terms of section 6(2) and (3) of the Government Proceedings Act, Cap.5 R.E 2019. Therefore, that, there was no requirement to issue notice and, the cases relied on by the defendants, were distinguishable, she argued.

In her submissions, however, she made an observation that, section 25(a) of the Written Laws (Miscellaneous Amendments) Act, 2020 (**"Act No.1 of 2020"**) amended section 6(3) of Cap.5 R.E 2019.

She submitted that, at the time of the institution of this suit, Act No.1 of 2020 had yet to come into operation until February 21, 2020 following the issuance of Gazzete No.8 Vol. 101. She contended that, the suit was filed on 21st January 2020, meaning that, at the time of filing, the law was yet to become operational.

Ms Bachuba submitted further that, as a matter of law, it is common knowledge that all procedural laws have retrospective effect, unless stipulated otherwise. She relied on the case **of Lala Wino vs Karatu District Council,** Civil Appl. No.132/02 of 2018 (CAT) (unreported).

In that regard, she contended that, Act No.1 of 2020 applied to the suit from 21st of February 2020 going forward and did not invalidate or rendered incompetent the suit. All in all she reiterated her earlier submissions that there were no facts implying that the ninety days' notice rule applied to the case.

According to Ms Bachuba, the 1st Defendant's shareholding structure, for the 1st time, was that the government had, through the **TR**, shares 49% of all shares and, as such, the requirement to issue a 90 days' notice did not apply.

She submitted further that, the Act No.1 of 2020 was enacted after the suit has been instituted and, thus, section 6A (1) of the Government Proceedings Act entitles the Attorney General, through the Solicitor General to intervene in the suit. She contended, thus, that, the obligation was upon the 1st Defendant to notify the Attorney General. On that basis she asked this Court to overrule the 1st Preliminary objection.

As regards the 2nd preliminary objection, Ms Bachuba submitted that, the same is misconceived. She contended that, the prayer made by the Plaintiff was for making the "necessary changes." As such, she submitted that, the Court order dated 12th July 2021 allowed the Plaintiff to make necessary amendment and did not limit the amendments which the Plaintiff could make to the suit. As such, she contended that, the amendments made by the Plaintiff were not beyond the orders of this Court.

Ms Bachuba distinguished the cases of **Micky Gilead, (supra)** and **Mohamed Rajuu (supra)** which the learned State Attorney for the Defendants had earlier relied upon to back up her submissions. Instead, she contended that, the Plaint was still in compliant with Order VII Rule 1 of the CPC, Cap. 33 RE 2019. She relied on a case from Uganda, the case of **Kwik Build Contractors Ltd vs. Kyadok Hardwares Ltd**, Misc. Appl. No. 178 of 2014 to further justify the amendments made to the Plaint arguing that, no prejudice or injustice has been suffered on the part of the Defendants.

Reliance was also placed on Article 107 (2)(e) of the Constitution of the United Republic of Tanzania and Section 3A of the CPC which, together provides for the overriding objective principle. This Court was also invited to take into account the case of **Sanyou Service Station vs. BP Tanzania Ltd (now Puma Energy (T)**

**Ltd**, Civil Appl.No.185/17 of 2018 concerning Courts' powers to order amendments. Finally, the Plaintiff requested this Court to overrule the two preliminary objections with costs.

On 30th September 2021, the State Attorney for the Defendants filed a rejoinder submission. She reiterated her earlier submissions. She noted that, when the counsel for the plaintiff made her prayers to amend the Plaint, she ought to have disclosed all relevant facts. She backed up her submissions by the Court of Appeal decision in **Mohamed Iqbal vs. Esrom M. Maryogo**, Civil Appl.No.141/01 of 2017, CAT, DSM (unreported). She prayed that the objections be upheld and the suit be struck out.

The issue which I am faced with is whether the two objections have merit. I will start by examining the first preliminary objection. In her submission, Ms Bachuba has contended that the objection should be overruled on the ground, among others, that, it does not fit within the parameters set out by the **Mukisa Biscuits'** case (supra) and **Karata Ernest's** case (supra). In those two cases, it was emphasized that a preliminary objection should be a point of law for which no evidence will be needed to establish it.

In the present suit at hand, the Plaintiff has submitted that the 1st Objection does not qualify as a

point of law. The said objection is to the effect that, the suit at hand is bad in law as it has contravened section 6 (2) of the Government Proceedings Act, Cap.5 R.E 2019. In my view, this is a legal issue which demands compliance with the provision of the law and does qualify as a point of law capable of disposing of the suit. As such, I do not side with the Plaintiff's counsel that the objection does not qualify as a point of law.

That fact aside, should this Court uphold the objection as one that is merited? As I stated herein, section 6 (2) of the Government Proceedings Act, Cap.5 R.E 2019 is a section demanding compliance if a suit falling under the ambits of the Government Proceedings Act is to be instituted or proceed to be heard. The relevant section provides as follows:

> "Section 6 (2): No suit against the Government shall be instituted, and heard unless the claimant previously submits to the Government Minister, Department or officer concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against the Government, and he shall send a copy of his claim to the Attorney-General and the Solicitor General."

The basis for the Defendant's reference to that section is the argument that, at the time when the suit was instituted, on 21st January 2020, the same was instituted in breach of the law since by that time the Defendant was owned by the Government by 85%. However, the argument by the Plaintiff's counsel is that, at that, there was no such indication in the 1st Defendant's written statement of defence and all along the 1st Defendant was a private entity and not an entity for which the section was to apply.

In my view, whether the 1st Defendant was an entity owned by the government as a majority shareholder even before the time when the suit was instituted or not, as stated by the Defendant, is a matter which was either known or ought to have been known by the Plaintiff when he instituted the case. A plaintiff ought to carry out her due diligence exercise to satisfy herself as to the status of the party she intends to sue. That fact notwithstanding, did section 6 (2) of Cap.5 R.E 2019 apply to the case?

In my view, the argument by the learned State Attorney that, even before the amendment came into effect the 1st Defendant was already owned by the Government as a majority shareholder, cannot warrant the application of section 6 (2) of Cap.5 R.E 2019

because the 1st Defendant was not captured under that provision.

It is worth noting, however, that, reliance has been placed, as well, on section 6 (3) of Cap.5 R.E as amended. As rightly pointed out by the Plaintiff's counsel, section 25 (a) of the Written Laws (Miscellaneous Amendments) Act, 2020 (**"Act No.1 of 2020"**) amended section 6 (3) of Cap.5 R.E 2019. According to the amendments, section 6 (3) reads as follows:

> "(3) All suits against the Government shall, upon the expiry of the notice period, be brought against the Government, ministry, government department, local government authority, executive agency, public corporation, parastatal organization or public company that is alleged to have committed the civil wrong on which the civil suit is based, and the Attorney General shall be joined as a necessary party.
>
> (4) Non-joinder of the Attorney General as prescribed under subsection (3) shall vitiate the proceedings of any suit brought in terms of subsection (3)..."

From that context, the gist of the matter in respect of the 1st objection, therefore, will be whether the above

amendments apply to the suit at hand. As a matter of fact, Act No.1 of 2020 came into operation following the issuance of Gazzete No.8 Vol. 101 on 21st February, 2020. This means, therefore, that, at the time of its filing on 21st January 2020, the law was yet to become operational. That being said, it means that the section cannot apply to the case filed before the amendments became operational. It would have been different had the suit been filed after the amendment of the law which is not the fact. As such, I overrule the first objection.

The second objection relates to the orders of this Court dated 12th June 2021. The gist of it is that the suit is bad in law as the amended Plaint is incompetent since it has been amended beyond the orders of this Honourable Court in paragraphs 5, 6 (a), 7, 8, 12, 14 and 15. I have given a look at the orders of this Court. It is indeed a fact that, on the 12th June 2021, this Court granted a prayer that the Hon. Attorney General be joined to the suit. I granted the prayers having been satisfied that the 1st Defendant is an entity in which the government controls majority shareholding.

It is also true that subsequently, the Plaintiff as well prayed to amend the Plaint and the prayer was specific, meaning that, it was to reflect the changes, i.e., the Joining of the Attorney General. In particular, this Court stated as follows:

"Order:

1. That, the Hon. Attorney General be joined as prayed.
2. The Plaintiff's prayer to amend the Plaint to reflect the changes in the Plaint is hereby granted."

In her submission, the learned counsel for the Plaintiff has submitted that, the prayer made by the Plaintiff was for making the "necessary changes." She has contended that the Court order dated 12th July 2021 did not limit the amendments which the Plaintiff could make to the suit, and, that, the amendments made by the Plaintiff were not beyond the orders of this Court.

In my understanding, however, the changes were very much limited to the prayer she had made, which prayer was necessitated or was to flow from the prayer to add the Attorney General as a Party to the Suit, since the pleadings were to read as such. Consequently, as I look at the Plaint, I do agree with the learned counsel for the Defendants that the amendments to the Plaint went overboard. That being said, the next question is whether, they should be condoned by this Court.

In a bid to convince this Court, the learned counsel for the Plaintiff has relied on the Ugandan decision in the case of **Kwik Build Contractors Ltd (supra)** arguing that, the amendments could still be condoned. In that case, the Court stated that:

> "an amendment may be allowed ....not withstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which, relief had already been claimed in the suit by the party amending."

In my view, a leaf could indeed be borrowed from the above case as I find that the above decision applies to the circumstances of the present case. As I look at the amended Plaint and consider the Defendant's submissions, much as the Plaintiff has amended the plaint far beyond the orders of this Court, I cannot see how the Defendants have suffered any prejudice because of that fact.

In the case cited here above, the Court was of the view, and I am as well convinced, taking into account the circumstance of this case, that, amendments which do not cause any prejudice to the other party who is taken to have knowledge of such cause of action at the time the original pleading is filed, can still be tolerated. In view of that, I do reject the second objection as well.

In the upshot, both objections are hereby overruled and dismissed. In the circumstances of this case, I make no orders as to costs.

**It is so ordered.**

DATED AT DAR-ES-SALAAM ON 12TH NOVEMBER 2021

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**DEO JOHN NANGELA**

**JUDGE**